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IN THE

Supreme Court of the United States

October Term, 1959

No. 1014 159

[illegible] INC.,

Petitioner,

vs.

[illegible] KIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

[illegible] MALAT,

Petitioner,

vs.

[illegible] A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

[illegible] ILSSUK ENTERPRISES, et al.,

Petitioners,

vs.

[illegible] A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE E. ALLMAN,
238 South Beverly Drive,
Beverly Hills, California,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

Supreme Court of the United States

October Term 1959

No. .....

KEVELL, INC.,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

WILLIAM MALAT,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

LOUIS LESSER ENTERPRISES, *et al.*,

Petitioner,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, and the UNITED STATES OF AMERICA,

Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners hereby petition this Court for a writ or writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion below, a single opinion covering all three causes, appears at 273 F. 2d 440 and a copy thereof is included in the record, beginning at page 53.

Grounds for Seeking the Writ.

The writ is sought on the ground that the court below decided a federal question in a way in conflict with applicable decisions of this court. Petitioners believe, also, that the writ should be granted on the ground that the court below has decided an important question of federal law which has not been but should be settled by this court. They concede, however, that this is a ground more properly raised by respondents.

Jurisdiction.

This petition involves three suits to cancel assessments of federal income and excess profits taxes and to enjoin the collection thereof. All of the petitioners have their places of business or homes in California, and filed their returns at Los Angeles, California. The jurisdiction of the District Court was based on 28 U. S. C., Sections 1340 and 2410, and also I. R. C. 1954, Section 6213(a) (I. R. C., 1939, Sec. 272(a)(1).) Judgments of the District Court dismissing the several actions were entered on November 14, 1958.

Notices of appeal to the United States Court of Appeals for the Ninth Circuit were filed on November 24, 1958. Jurisdiction of the said court was based on 28 U. S. C., Section 1291. Judgments of the Court of Appeals affirming the several judgments of the District Court were entered December 21, 1959. [R. 74-76.] Motion to extend the time for filing a petition for rehearing in that court was filed on January 7, 1960, and pursuant thereto the time for filing such a petition was ex-

tended to March 15, 1960. Petition for rehearing in that court was filed March 14, 1960. [R. 83.] The said petition was denied on March 23, 1960. [R. 83.]

The jurisdiction of this court is based on 28 U. S. C., Section 1254(1).

Question Presented.

The ultimate question is whether the District Court had jurisdiction of the subject matter in this proceeding. The assessments involved followed notices of deficiency issued by the Commissioner of Internal Revenue under Section 272(a)(1) of the Internal Revenue Code of 1939, or Section 6212(a) of the Internal Revenue Code of 1954, and petitioners concede that the District Court had no jurisdiction of the subject matter if the "determination" of deficiency recited in each of the said notices was in fact a determination. Petitioners contend, however, that in each case the "determination" recited in the deficiency notice was not a determination at all and that in fact no determination had been made by the Commissioner of Internal Revenue. Thus the question presented resolves itself down to the narrow question of whether or not what the Commissioner did, shown in the Statement below, constituted such a determination.

Statutes Involved.

The statutory provisions directly involved in this proceeding, Sections 15(c), 129, and 272(a)(1) of I. R. C. 1939, and Sections 269, 1551, 6212(a) and 6213(a) of I. R. C. 1954, are set forth in the Appendix, *infra*.

Statement.

These three cases, as already noted, involve assessments of income and excess profits taxes. In each of the three cases a suit to cancel the assessment and enjoin the collection was filed by the respective petitioner, alleging that the assessment was invalid because there was no actual determination of a deficiency, as required by the applicable provisions of the revenue law. Respondent moved to dismiss on the ground that the court lacked jurisdiction of the subject matter because of statutory provisions prohibiting suits to restrain the assessment or collection of tax. Petitioners contended, however, that they were not within those prohibitions, because, while there were purported notices of deficiency, no deficiencies had actually been determined as required by law.

The basis of the contention that no deficiencies had actually been determined as required by law was that in each case there were in fact not one but several notices of deficiency, issued concurrently, to the same person, and based upon the same income. In each case the "determinations" asserted in the respective notices were in conflict with one another because based on different and conflicting theories of fact. Indeed, each "determination" was in a different amount. The reason given by the court below for this multiplex procedure of conflicting "determinations" is the asserted need to "protect the revenue" by preventing the bar of the statute of limitations, while a proceeding on the basis of one theory of fact is pending, from running against "determinations" on other theories.

In each case on one of the conflicting notices of deficiency no petition was filed in the Tax Court, so that the assessment involved here followed, while on the other or other notices, petitions were filed in the Tax Court and are

there pending. As to the notices which resulted in the assessments involved here, the "determinations" are shown therein as based on Sections 15(c) and 129 of I. R. C. 1939 and Sections 1551 and 269 of I. R. C. 1954.

These are the significant circumstances, as clearly shown in the opinion of the court below. The details in respect to each case appear in that opinion and we shall not burden this court by repeating them here.

Related Proceedings in the Court Below.

Because the court below, as a necessary step in its reasoning, indicated in its opinion that as a consequence of this conflict of "determinations" the burden of proof would be upon the government, these petitioners attempted in the proceedings pending in the Tax Court to obtain an order requiring the Commissioner to state fully the facts upon which he relied for his defense. That court, however, denied the application for such order, holding that the burden of proof was on the petitioners, despite the opinion to the contrary of the court below. Petitioners thereupon attempted in the court below to obtain a writ of mandamus under 28 U. S. C. Section 1651(a) requiring the Tax Court to issue such an order. The court below, however, on April 1, 1960, denied the motions for leave to file the said petitions for writ of mandamus.

We believe those petitions may have a bearing on the three injunction actions described in the "Statement" above and for that reason include them, together with the motions for leave to file them, as three additional cases within the scope of this petition for a writ of certiorari. We realize, however, that the principle expressed in Rule 30 of this court may also apply to the

court below. We therefore respectfully request that the writ of certiorari be granted as to the three injunction actions even if it is denied as to the three proceedings for mandamus.

Argument.

1. A notice of deficiency under Section 272(a)(1) of I. R. C. 1939 (Sec. 6212(a) in I. R. C. 1954) must be preceded by a *determination* of deficiency. *United States v. Price*, 80 S. Ct. 320, 328, where this court stated: "The plain sense of this provision contemplates, first, a determination, and then the sending of a notice." While such a determination is under review in the Tax Court assessment and collection may be enjoined, under the express terms of Section 272(a)(1) of I. R. C. 1939 (Sec. 6213(a) in I. R. C. 1954). *United States v. Price, supra*, 80 S. Ct. at page 328. However, assessment and collection as sanctioned by the court below, under color of one "determination" while another "determination" made concurrently against the same person based on the same income is under review in the Tax Court, would clearly be a mere evasion of those statutory provisions.

2. To allow concurrent conflicting "determinations," as the court below did, is to convert the "determination" required by the statute into a mere pleading.* If the Commissioner may concurrently make two or three conflicting "determinations" against the same person in respect to the same income, he may make a hundred such determinations. The statute itself, however, provides for only one: It provides only for *a* notice of deficiency, I. R. C. 1954, Section 6212(a)(1), or *such* notice of deficiency.

*The Tax Court has significantly referred to such "determinations" as *proposals*. *Hendrickson v. Commissioner*, 3 T. C. 231.

I. R. C. 1939, Section 272(a)(1), *United States v. Price*, *supra*, at page 327; and that notice is *the* notice authorized by the statute, I. R. C. 1954, Section 6213(a).

3. Concurrent conflicting "determinations" cannot be the determinations required here because a determination of deficiency must represent the *final decision* of the Commissioner of Internal Revenue. The Tax Court, in *Terminal Wine Co. v. Commissioner*, 1 B. T. A. 697, at page 701, expressed the principle as follows:

> "The *determination* from which a taxpayer may appeal is one which fixes the amount of *deficiency* in tax. It is the final decision by which the controversy as to the deficiency is settled and terminated, and by which a final conclusion is reached relative thereto and the extent and measure of the deficiency defined." (Italics in original.)

The foregoing view of the Tax Court is confirmed in *Hulburd v. Commissioner*, 290 U. S. 300, where this court stated, at page 306:

> "The duty to inquire and determine was imposed by the statute upon him [the Commissioner] and not upon an agency of government established for the purpose of revising his decision [referring to the Tax Court]."

To the same effect, *Flora v. United States*, 80 S. Ct. 630, 637, where the purpose of Congress in establishing the Tax Court is shown to be provision for an *appeal* by the taxpayer prior to payment.

The meaning of a "determination" of deficiency as a final decision by the officer making it is also supported by the highest court of a state. In *Appeal of Hoskins*

Manufacturing Co., 259 N. W. (Mich.) 334, there was involved a statute which required the Secretary of State "to make a 'determination' of the tax, subject to a 'redetermination' by the board on appeal. . . ." In that case, as here, the determination was *ex parte* and the redetermination was not limited to the sufficiency of the evidence before the examining officer or to a question of law. Referring to the statutory provision quoted, the Supreme Court of Michigan there stated, at page 336:

> "'Determination' implies judgment and decision after weighing the facts. The duty to fix the tax has a quasi judicial tinge."

Clearly the view expressed by the court below, in justification of the conflicting "determinations" involved here, that the Commissioner's "determination" under the statute need not be a final decision by him [R. 71], is erroneous.

4. The several sections on which the "determinations" which resulted in the assessments involved here were based, Sections 15(c) and 120 of I. R. C. 1939 and Sections 1551 and 269 of I. R. C. 1954, contain *statutory* presumptions in favor of the government. The court below, however, in order to sustain those "determinations," despite their conflict with the concurrent "determinations" pending in the Tax Court, assumed [R. 71] that the benefit of any presumption of correctness would be lost to the government. It follows that its opinion is erroneous because directly in the teeth of express statutory provisions. No interpretation of a statute can stand if it is contrary to the clear terms of the statute. *Biddle v. Commissioner*, 302 U. S. 573; *Helvering v. Sabine Transportation Co., Inc.*, 318 U. S. 306.

5. If the notices of deficiency involved here are only protective, as the court below stated [R. 72], then they are false and deceptive on their face. Nowhere in any of the notices, all shown verbatim in the record, is such "protective" character disclosed. However, a taxpayer is entitled to have the government deal honestly with him. It is the essence of due process that any process shall be genuine and show the truth of what it means. As stated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314, 70 S. Ct. 652, 657, cited at 16A C. J. S. 811, a notice, in order to comply with the requirement of due process, "must be of such nature as reasonably to convey the required information." As C. J. S. puts it at the point above stated, and on the basis of numerous authorities, "The contents of the notice must be such as to apprise defendant of the nature of the claim against him and of the relief sought." It is further stated, at 60 C. J. S. 654: "A notice must be clear, definite, and explicit, and not ambiguous. The notice is not clear unless its meaning can be apprehended without explanation or argument."

6. As pointed out in the "Statement" above, the reason given in the opinion below for the multiplex procedure of conflicting "determinations" of tax liability by the Commissioner of Internal Revenue is the asserted need to protect the revenue by preventing the bar of the statute of limitations, while a proceeding on the basis of one theory of tax liability is pending, from running against "determinations" on other theories. The federal revenue statutes have, however, ever since 1938, made provision for these statute-of-limitations difficulties by express and particular enactment, under the heading of "Mitigation of Effect of Limitations and Other Provisions." Revenue Act of 1938, Section 820; I. R. C. 1939,

Section 3801; I. R. C. 1954, Sections 1311-1315. Those provisions were the answer of Congress to *McEachern v. Rose*, 302 U. S. 56, decided November 8, 1937. See 1939-1 C.B. (Part 2) 814-815. Certainly neither the Commissioner nor the judiciary, but only the Congress, has the power to enlarge upon them. *Iselin v. United States*, 270 U. S. 245, 250-251, 46 S. Ct. 248, 250.

7. In *Flora v. United States*, *supra*, it was pointed out by this court that after the Commissioner of Internal Revenue makes his determination the taxpayer may go in either of two directions. He may, without paying, appeal to the Tax Court. He may, on the other hand, by failing to appeal to the Tax Court allow the amount determined to be assessed, pay it in full, file claim for refund, and then sue for the refund in a district court or the Court of Claims. But he must take one procedure or the other; he cannot take both, as to either all of different parts of the tax. As this Court there stated, at page 640:

> "The result is a system in which there is one tribunal for prepayment litigation and another for post-payment litigation, with no room contemplated for a hybrid of the type proposed by petitioner."

As otherwise expressed, there is but a single cause of action and it may not be split. *Ibid.*, page 641.

Here, however, there has resulted, in respect to taxes of the same taxpayer on the same income, post-payment litigation pending in the Tax Court, and assessments which the court below holds, by denying the injunctions sought, can only be challenged by prepayment litigation. Thus the Commissioner's procedure of conflicting "determinations," approved by the court below, has resulted

in splitting the cause of action, which this Court in the *Flora* case held may not be done.

8. Respondent may in support of the opinion below assert that the Commissioner has had a practice of making such conflicting "determinations." For that purpose respondent may refer to cases in which conflicting determinations have been involved, although the issue of their validity in the light of their conflict was never raised or considered*. But practice does not sanctify error. *Biddle v. Commissioner, supra*, at page 582; *Helvering v. Sabine Transportation Company, Inc., supra*, at pp. 311-312; 55 Am. Jur. (Secs. 14, 17) 275, 279; 43 Am. Jur. (Sec. 250) 70; 65 A. L. R. 811; 73 C. J. S. (Sec. 48) 367. The rule is stated in 43 Am. Jur., at the page cited, as follows: "usage or custom cannot be availed of to enlarge the statutory powers of a public officer to include acts

*The cases cited below for that purpose are not even relevant. In one group of cases, *Overcash v. Commissioner* (C. A. 9), 22 F. 2d 708, *Commissioner v. Wilshire Holding Corp.* (C. A. 9), 244 Fed. 804, cert. denied, 355 U. S. 815, 879, and *Wilshire Holding Corporation v. Commissioner* (C. A. 9), 262 F. 2d 51, in another case, *Robinson v. Elliot* (C. A. 9), 262 F. 2d 383, and in the cases of *Commissioner v. Southwest Exploration Co.* and *United States v. Huntington Beach Co.*, 350 U. S. 308, the conflicting determinations were not against the same person, even indirectly. They were against wholly different persons in opposing positions, lessor or vendor and lessee or vendee in the *Overcash*, *Wilshire* and *Robinson* cases, and the owner and the developer of oil deposits in the *Southwest* and *Huntington* cases. In another case, *Thompson Scenic Ry. Co. v. Commissioner*, 21 B. T. A. 718, the persons to whom deficiency notices were sent were also different. Besides, those persons, three corporations, had filed a single consolidated return, and the only issue was the allocation of the consolidated tax among them. Nor was the Commissioner inconsistent. He first determined that one of the corporations was liable for the entire tax, and after finding that that corporation was not liable he made determinations dividing the tax between the other two, and the Board sustained him. In two other cases, *Hendrickson v. Commissioner, supra*, and *Commissioner v. Consolidated Electric Glass* (C. A. 6th), 265 F. 2d 320, the court decided against the Commissioner in every docket. There was no problem of inconsistency left to be decided, even if it had been raised.

otherwise unauthorized or contrary to established law or to enable the officer to perform his duties in a manner other than that prescribed by statute." No wonder here the court below treated the issue before it as one of first impression. [R. 69.]

9. This point covers the related petitions filed below for writs of mandamus to the Tax Court (*supra*, p. 5). In the said petitions the validity of the conflicting notices was assumed. The action sought of the Tax Court, an order to the Commissioner to state the facts on which he relied for his defense, is the only method available to the taxpayer for discovery in that court. *Commissioner v. Licavoli* (C. A. 6), 252 F. 2d 268. If the proceedings in that court involving those conflicting "determinations" had to be tried on the theory that the burden of proof was on petitioners, and with no detail available to petitioners of the facts on which the Commissioner relied, the trial would be grievously unfair to petitioners, regardless of subsequent review on appeal. The remedy by appeal would, therefore, be inadequate, so that writs of mandamus would be proper. See *Minor v. Atlass* (C. A. 7), 265 F. 2d 312, 313, certiorari granted, 80 S. Ct. 66, No. 150; *Berger v. United States*, 255 U. S. 22, 36; *Black v. Boyd* (C. A. 6), 248 F. 2d 156, 160-161. Of course, if this Court sustains petitioners' primary contention that the conflicting notices are invalid, then this issue of mandamus becomes moot.

Wherefore, petitioners pray that this Court issue the writ or writs of certiorari sought herein to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

GEORGE T. ALTMAN,
Attorney for Petitioners.

APPENDIX.

Statutes Involved:

I.R.C. 1939

Sec. 15. Surtax on Corporations.

(c) Disallowance of Surtax Exemption and Minimum Excess Profits Credit.—If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 129(b)) be allowed either the $25,000 exemption from surtax provided in subsection (b) or the $25,000 minimum excess profits credit provided in the last sentence of section 431, unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For the purposes of this subsection, control means the ownership of stock possessing at least 80 per centum of the total combined voting power of all classes of stock entitled to vote or at least 80 per centum of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this subsection, the ownership of stock shall be determined in accordance with the provisions of section 503, except that constructive ownership under section 503(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of

section 129(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this subsection, be applicable to this subsection. This subsection shall not apply to any taxable year with respect to which the tax imposed by subchapter D of this chapter is not in effect.

SEC. 129. Acquisitions Made to Evade or Avoid Income or Excess Profits Tax.

(a) Disallowance of Deduction, Credit, or Allowance.—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clause (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

(b) Power of Commissioner to Allow Deduction Etc., in Part.—In any case to which subsection (a) is applicable the Commissioner is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) PETITION TO BOARD OF TAX APPEALS.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with

the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

I.R.C. 1954

Sec. 269. Acquisitions Made to Evade or Avoid Income Tax.

(a) In General.—If—

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.

(b) Power of Secretary or His Delegate to Allow Deduction, Etc., in Part.—In any case to which subsection (a) applies the Secretary or his delegate is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

(c) Presumption in Case of Disproportionate Purchase Price.—The fact that the consideration paid upon an acquisition by any person or corporation described in subsection (a) is substantially disproportionate to the aggregate—

(1) of the adjusted basis of the property of the corporation (to the extent attributable to the interest acquired specified in paragraph (1) of subsection (a)), or of the property acquired specified in paragraph (2) of subsection (a); and

(2) of the tax benefits (to the extent not reflected in the adjusted basis of the property) not

available to such person or corporation otherwise than as a result of such acquisition,

shall be prima facie evidence of the principal purpose of evasion or avoidance of Federal income tax. This subsection shall apply only with respect to acquisitions after March 1, 1954.

Sec. 1551. Disallowance of Surtax Exemption and Accumulated Earnings Credit.

If any corporation transfers, on or after January 1, 1951, all or part of its property (other than money) to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition, and if after such transfer the transferor corporation or its stockholders, or both, are in control of such transferee corporation during any part of the taxable year of such transferee corporation, then such transferee corporation shall not for such taxable year (except as may be otherwise determined under section 269(b)) be allowed either the $25,000 exemption from surtax provided in section 11(c) or the $100,000 accumulated earnings credit provided in paragraph (2) or (3) of section 535(c), unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer. For purposes of this section, control means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of the corporation. In determining the ownership of stock for the purpose of this section, the ownership of stock shall be determined in accordance with the provisions of section 544, except that construc-

tive ownership under section 544(a)(2) shall be determined only with respect to the individual's spouse and minor children. The provisions of section 269(b), and the authority of the Secretary under such section, shall, to the extent not inconsistent with the provisions of this section, be applicable to this section.

Sec. 6212. Notice Of Deficiency.

(a) In General.—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

Sec. 6213. Restrictions Applicable to Deficiencies; Petition To Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court,

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible] 159

[illegible] INC.,

[illegible]

[illegible] V. RUSSELL, [illegible] and the UNITED STATES OF AMERICA,

[illegible]

WILLIAM MALAT

[illegible]

[illegible] V. RUSSELL, [illegible] and the UNITED STATES OF AMERICA,

[illegible]

[illegible] IS LESSER ENTERPRISES, [illegible]

[illegible]

[illegible] V. RUSSELL, [illegible] and the UNITED STATES OF AMERICA,

[illegible]

Second Appendix to Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

GEORGE P. [illegible]
[illegible] South Beverly Drive
Beverly Hills, California
[illegible]

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171

SECOND APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Revell, Inc., Appellant, vs. Robert A. Riddell, District Director of Internal Revenue, and the United States of America, Appellees. No. 16,331.

William Malat, Appellant, vs. Robert A. Riddell, District Director of Internal Revenue, and the United States of America, Appellees. No. 16,332.

Louis Lesser Enterprises, *et al.* Appellant, vs. Robert A. Riddell, District Director of Internal Revenue, and the United States of America, Appellees. No. 16,333.

December 21, 1959.

On Appeals from the Orders of the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Hamlin and Jertberg, Circuit Judges.

Jertberg, Circuit Judge.

We have before us three appeals in three separate cases. As the legal issue presented in three cases is the same we granted leave to consolidate the cases for briefing and argument.

In each case the plaintiff sought to enjoin the collection of income and excess profits taxes which had been assessed and to cancel the purported assessment and any lien which may arise therefrom. In each case the district judge dismissed the action for lack of jurisdiction of the district court over the subject matter of the action. The order of dismissal by the district court in each case was based on Title 26 U. S. C. A. Section 7421(a), Internal Revenue Code of 1954, which reads as follows:

"Prohibition of suits to restrain assessment or collection

(a) Tax—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

History of Case No. 16,331

If we have been successful in following the skein of circumstances leading up to the assessment in this case, the factual situation as gathered from the plaintiff's third amended complaint is as follows: The skein begins with the California corporation named Revell, Inc., whose capital stock was wholly owned by Lewis H. Glaser and Royle L. Glaser, husband and wife, which corporation will be referred to as Revell No. 1. Thereafter fifteen corporations were formed[1] which became transferee corporations of Revell No. 1. Seventy-five per cent of the capital stock of these transferee corporations was likewise owned by Mr. and Mrs. Glaser. In 1957 one of these transferee corporations, namely Cutlass Molds, Inc., the collection of whose taxes is in issue on this appeal, was merged into another transferee of Revell No. 1, namely S. U. S. 312 Molds, Inc. In 1958 Revell No. 1 was itself merged into S. U. S. 312 Molds, Inc., and later the name of S. U. S. 312 Molds, Inc. was changed to Revell, Inc., which we will hereafter refer to as Revell No. 2. Thus Revell No. 2 became the transferee of both Revell No. 1 and Cutlass Molds, Inc.

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[1]Baltimore Molds, Inc.; Cabin Cruiser Molds, Inc.; 307 Carrier Molds, Inc.; Curless Molds, Inc.; Toy Truck Molds, Inc.; Cougar Molds, Inc.; Destroyer Molds, Inc.; Missouri Molds, Inc.; PT Boat Molds, Inc.; Royle Company; Hot Rods Molds, Inc.; Starfire Molds, Inc.; Submarine Molds, Inc.; Collectors' Kits, Inc.; Shooting Gallery Molds, Inc.

On December 2, 1957, the Commissioner of Internal Revenue sent three notices of tax deficiency determinations. One notice was sent to Cutlass Molds, Inc., one notice was sent to Revell No. 1 apparently as transferor of Cutlass Molds, Inc., and the third notice was sent to Mr. and Mrs. Glaser.

The notice sent to Cutlass Molds, Inc. stated: "You are advised that the determination of your income and excess profits tax liability for the taxable year ended March 31, 1954, discloses a deficiency of $2,659.54, as shown in the statement attached." In the attached statement appears the following:

"This determination of your income and excess profits tax liability has been made upon the basis of information on file with the Internal Revenue Service.

"It is determined that you and the following 14 corporations are transferee corporations of Revell, Inc., and the surtax exemption and excess profits credit claimed in your return are disallowed in accordance with the provisions of sections 15(c) and 129 of the Internal Revenue Code of 1939 and sections 1551 and 269 of the Internal Revenue Code of 1954."

There is then listed the corporations listed in footnote 1 except Cutlass Molds, Inc.

"* * * You are allowed a surtax exemption of $1,502.50 and an excess profits credit of $1,502.50 which is your share of a single surtax exemption of $25,000.00 and a single excess profits credit of $25,000.00 allocated equally among you, Revell, Inc., and the above 14 transferee Corporations of Revell, Inc.

Net Income

"The net income of $8,445.33 disclosed by your income tax return for the taxable year ended March 31, 1954, is accepted as correct.

Excess Profits Net Income

"Inasmuch as no Corporation excess profits schedule has been filed, your excess profits net income is determined to be $8,445.33."

There then appears a detailed Computation of Tax, Summary thereof, and statement of deficiency.

On April 16, 1958 the deficiency in the tax was assessed, and thereafter the plaintiff [Revell No. 2] filed its action in the district court to enjoin collection of such deficiency.

The second notice of tax deficiency determination was sent to Revell, Incorporated [probably Revell No. 1], as transferor of Cutlass Molds, Inc. In the notice sent to Revell, Incorporated, it is stated: "You are advised that the determination of your income and excess profits tax liability for the taxable year ended June 30, 1954, discloses a deficiency of $155,809.03, as shown in the statement attached." In the attached statement appears the following:

"This determination of your income and excess profits tax liability has been made upon the basis of information on file with the Internal Revenue Service.

"It is determined that the income and deductions reported in the returns of the following 16 corporations represent income and deductions properly includible in your return for the taxable year ended June 30, 1954, within the meaning of sections 22(a) and 45 of the Internal Revenue Code of 1939 and or Sections 61(a) and 482 of the Internal Revenue Code of 1954.

"In the alternative, it is determined that you are the transferee of the following indicated 15 corporations and the surtax exemption claimed in your return is disallowed in accordance with the provisions of sections 15(c) and 129 of the Internal Revenue Code of 1939

and/or sections 1551, and 269 of the Internal Revenue Code of 1954.

"You are allowed a surtax exemption of $1,562.50 which is your share of a single surtax exemption of $25,000.00 allocated equally among you and the 15 corporations indicated as your transferees."

There is then listed the corporations appearing in footnote 1 and another corporation which is designated as follows: "Stratojet Molds, Inc. (Not for transferee purposes)."

* * *

Adjustments to Net Income

	Income Tax Net Income	Excess Profits Net Income
Net Income as disclosed by return	$ 43,332.04	$ 55,753.31
Unallowable deductions and Additional Income:		
(a) Miscellaneous selling expense	1,800.00	1,800.00
(b) Legal expense	529.25	529.25
(c) Additional income	237,146.81	237,146.81
Net Income, as adjusted	$282,808.10	$295,229.37

Explanation of Adjustments

(a) and (b) * * *

(c) The net of the incomes and deductions reported by the previously-listed 16 corporations during the taxable year ended June 30, 1954, are re-allocated to you as previously explained."

There then appears a detailed Computation of Tax, Summary thereof, and statement of deficiency.

A petition for redetermination of this deficiency determination was timely filed in the Tax Court of the United States, and such petition is pending and undetermined.

The third notice of tax deficiency determination was sent to Mr. and Mrs. Glaser. In the notice of tax deficiency determination sent to Mr. and Mrs. Glaser it is stated: "The determination of your income tax liability for the above taxable year [taxable year ended December 31, 1954] discloses a deficiency or deficiencies in the amount shown above and in the statement attached." In the attached statement appears the following:

"This determination of your income and excess profits tax liability has been made upon the basis of information on file with the Internal Revenue Service.

* * *

Adjustments to Taxable Income

"(a) Your income is increased in the amount of $102,370.58 which constitutes 75% of the total incomes (or losses) of the so-called seventeen corporations listed below:"

There is then listed the corporations appearing in footnote 1 except Hot Rod Molds, Inc., and there is added three additional corporations, to-wit: Inter Cor Molds, Inc., Stratojet Molds, Inc., and Bomber Molds, Inc.

"These seventeen entities are not recognizable for federal income tax purposes and the income allocated herein was generated by your efforts and disposed of under your direction and control. Accordingly, said income is reportable by you under the provisions of section 61(a) and or 482 of the Internal Revenue Code of 1954."

There then appears a detailed Computation of Tax, and statement of deficiency.

A petition for the redetermination of this tax deficiency determination was timely filed by Mr. and Mrs. Glaser in the Tax Court of the United States. Said petition remains pending and undetermined.

HISTORY OF CASE No. 10,332

The tax curtain opens on 23 separate corporations and a partnership owned by these corporations.[2] Thereafter the 23 corporations and the partnership were dissolved and the assets transferred.

On March 4, 1958 the Commissioner of Internal Revenue sent five notices of tax deficiency determinations to William Malat as one of the transferees. In one of these notices it is stated: "You are advised that the determination of the income and excess profits tax liability of" there is then listed the 23 corporations and the partnership, "an association, taxable as a single corporation, for the taxable year ended December 31, 1953, discloses a deficiency in tax of $298,372.80 and penalty of $74,593.22, as shown in the statement attached. $14,645.40 of the amount of the income and excess profits tax deficiency and penalty, plus interest as provided by law, will be assessed against you as transferee of assets of said Association, taxable as a single corporation." In the attached statement it is stated that the 23 corporations and the partnership "constitutes an association, taxable as a single corporate entity, within the purview of sections 3797 and 22(a) of the Internal Revenue Code of 1939." It is further stated that the records in the office of the Commissioner indicate that the 23 corporations and the partnership constituting an association taxable as a single corporation had been dissolved and that assets were transferred to Mr. Malat. It is

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[2] Velell Homes, Inc.; Berry Homes, Inc.; Clifford Homes, Inc.; Dana Homes, Inc.; Drake Homes, Inc.; Earl Homes, Inc.; Francine Homes, Inc.; Gill Homes, Inc.; Horton Homes, Inc.; Ivan Homes, Inc.; Jackson Homes, Inc.; Jana Homes, Inc.; Justin Homes, Inc.; Karl Homes, Inc.; Lewis Homes, Inc.; Nelson Homes, Inc.; Merle Homes, Inc.; Morton Homes, Inc.; Murray Homes, Inc.; Oscar Homes, Inc.; Paul Homes, Inc.; Quay Homes, Inc.; Ronald Homes, Inc., and the Ealworth Company.

further stated that the sum of $14,045.40 "represents your liability as a transferee of assets of said association, taxable as a single corporation, for a deficiency in income and excess profits tax and penalty due from said association, taxable as a single corporation, for the taxable year ended December 31, 1953." The attached statement also contains detailed statements of net income, explanation thereof, explanation of adjustments, detailed computation of tax, summary, and statement of deficiency.

The deficiency in tax was assessed August 12, 1958, and thereafter William Malat instituted the action below to restrain the collection of such deficiency.

The second notice of income tax deficiency determination sent to Mr. Malat stated:

"You are advised that the determination of the income and excess profits tax liability of Ronald Homes, Inc. * * * for the taxable year ended December 31, 1953, discloses a deficiency of $9,284.90, as shown in the statement attached. $3,449.93 of the amount of the deficiency stated, plus interest as provided by law, constituting your liability as transferee of assets of said Ronald Homes, Inc., will be assessed against you."

In the attached statement appeared the following: "Inasmuch as the value of the assets received by you amounted to $3,449.93, your liability as transferee is limited to that amount. The records of this office indicates that Ronald Homes, Inc. * * * has been dissolved and that assets were transferred to you." It is further stated:

ability as a transferee of assets of Ronald Homes, Inc. * * * for a deficiency of income and excess profits tax due from Ronald Homes, Inc., for the taxable year ended December 31, 1953. * * *

"It is determined that the provisions of sections 45 and 129 of the Internal Revenue Code of 1939 are applicable to the 23 corporations shown below (including Ronald Homes, Inc.), and accordingly the surtax exemption and excess profits credit claimed in the return are disallowed."

It is further stated:

"In accordance with the provisions of sections 45 and 129 of the Internal Revenue Code of 1939 it is determined that the allowable surtax exemption of Ronald Homes, Inc., is $1,080.90 and its allowable excess profits credit is $1,080.90, which its share of a single surtax exemption of $25,000, and a single excess profits credit of $25,000.00, allocated equally among the 23 corporations (including Ronald Homes, Inc.)."

The attached statement also contains detailed statements of net income, explanation thereof, explanation of adjustments, detailed computation of tax, summary, and statement of deficiency.

A petition was timely filed with the Tax Court of the United States for the redetermination of such deficiency determination, and such petition is pending and undetermined.

The third, fourth and fifth notices of tax deficiency determinations were in the amounts of $3,987.63, $4,207.72 and $2,910.12 respectively, and were sent to William Malat as transferee of Quay Homes, Inc., Paul Homes, Inc., and Oscar Homes, Inc. The statement attached to each notice of tax deficiency determination was similar in form to the notice of tax deficiency determination sent to Mr. Malat as transferee of Ronald Homes, Inc.

Petitions were timely filed in the Tax Court for redetermination of these tax deficiency determinations, and said petitions are pending and undetermined.

It is to be noted that the transferee liability of Mr. Malat determined in the last four notices of tax deficiency determinations totaled $14,045.40 which is the same amount asserted against Mr. Malat in the first notice of tax deficiency determination wherein the 23 corporations and the partnership were stated to be an "association taxable as a single corporate entity."

HISTORY OF CASE NO. 16,333

In this case we have the same 23 corporations and the partnership owned by such corporations as appear in case No. 16,332. As stated in case No. 16,332, these corporations and the partnership were dissolved and their assets transferred. On March 4, 1958, the Commissioner of Internal Revenue sent two notices of tax deficiency determinations to Louis Lesser Enterprises, a partnership consisting of Louis Lesser, William Malat, Louis Loma, Louis Rudman and Alvin Lesser. The first notice stated:

"You are advised that the determination of the income and excess profits tax liability of [here is listed the 23 corporations and the partnership owned by them], an association taxable as a single corporation, for the taxable year ended December 31, 1953, discloses a deficiency in tax of $298,372.80 and penalty of $74,593.22, as shown in the statement attached. $128,336.40 of the amount of the income and excess profits tax deficiency and penalty, plus interest as provided by law, will be assessed against you as transferee of assets of said Association, taxable as a single corporation."

In the statement attached appears the following:

"The records of this office indicate that [here is listed the 23 corporations and the partnership], an association, taxable as a single corporation * * * has been dissolved and that assets were transferred to you."

Further it is stated that said corporations and the partnership "constitutes an association, taxable as a single corporate entity, within the purview of sections 3797 and 22(a) of the Internal Revenue Code of 1939." The attached statement also contains detailed statements of net income, explanation thereof, explanation of adjustments, detailed computation of tax, summary, and statement of deficiency.

A petition for redetermination of this deficiency determination was timely filed in the Tax Court of the United States, and is pending and undetermined.

The other notice stated "that the determination of the income and excess profits tax liability of Ardell Homes, Inc. * * * for the taxable year ended December 31, 1953, discloses a deficiency of $11,802.39, as shown in the statement attached." And, "The amount of the deficiency stated, plus interest as provided by law, constituting your liability as transferee of assets of said Ardell Homes, Inc., will be assessed against you." In the statement attached appears:

"The records of this office indicate that the Ardell Homes, Inc. * * * has been dissolved and that assets were transferred to you."

And:

"In accordance with the provisions of sections 45 and 29 of the Internal Revenue Code of 1939 it is determined that the allowable surtax exemption of Ardell Homes, Inc., is $1,080.90 and its allowable excess profits credit is $1,080.90, which is its share of a single surtax

exemption of $25,000.00 and a single excess profits credit of $25,000.00, allocated equally among the 23 corporations (including Ardell Homes, Inc.)."

The attached statement also contains detailed statements of net income, explanation thereof, explanation of adjustments, detailed computation of tax, summary, and statement of deficiency.

On August 12, 1958 the deficiency in tax was assessed against Louis Lesser Enterprises. Thereafter action was instituted in the court below to restrain the collection of such deficiency.

It is evident from a review of the notices of tax deficiency determinations made by the Commissioner in these three cases that the basic purpose or design of the Commissioner in the performance of his duty to protect the revenue was to prevent tax avoidance or evasion and to require that income be properly reflected.

In order to accomplish such purpose or design:

1. The Commissioner in case No. 10,331, acting on the information and data before him, drew three separate and conflicting conclusions as to tax liability, to-wit:

(a) In respect to the transferee corporations listed in footnote 1, the Commissioner concluded to treat for tax purposes each such corporation as a separate entity, but entitled, however, only to its aliquot share of one single surtax exemption and one single excess profits credit allowable to all of said corporations as a group, and that, therefore, Cutlass Models, Inc. was entitled only to its aliquot share of such exemption and such credit.

(b) In respect to the transferor corporation, Rexell No. 1, the Commissioner concluded to disregard for tax purposes the separate existence of the corporations listed

in footnote 1 and Stratojet Molds, Inc., and to treat for tax purposes the combined income and deductions reported in their returns as being properly includable in the return of Revell No. 1.

(c) In respect to the shareholders of the corporations listed in footnote 1, except Hot Rod Molds, Inc. and Bomber Molds, Inc., the Commissioner concluded, to disregard, for tax purposes the separate existence of said corporations, and to treat for tax purposes the combined incomes or losses of said corporations as being properly returnable in the returns of the shareholders, and therefore 75 per cent of the incomes of the corporations listed in footnote 1, except Hot Rod Molds, Inc. and 75 per cent of the incomes of Inter Con Molds, Inc., Stratojet Molds, Inc., and Bomber Molds, Inc. was properly includable in the returns of Mr. and Mrs. Glaser.

2. In case No. 10332, the Commissioner, acting on the information and data before him, drew two separate and conflicting conclusions as to tax liability, to wit:

(a) In respect to the corporations listed in footnote 2, the Commissioner concluded to treat for tax purposes each such corporation as a separate entity but entitled, however, only to its aliquot share of one single surtax exemption and one single excess profits credit allowable to all of said corporations as a group, and that therefore, Ronald Homes, Inc., Omar Homes, Inc., Paul Homes, Inc., and Oscar Homes, Inc. were each entitled only to its aliquot share of such exemption and such credit, and that as transferee of assets of each of said dissolved corporations Mr. Malat was liable in the amount of the value of the assets received by him from each of said corporations.

(b) In respect to the corporations and the partnership listed in footnote 2, the Commissioner concluded to disregard for tax purposes the separate existence of each such corporation and such partnership as a separate entity, but to treat for tax purposes the 23 corporations and the partnership as constituting only one entity, and that, therefore, Mr. Malat was liable as a transferee of the assets received by him on dissolution of the corporations and the partnership.

3. In case No. 10,333, the Commissioner, acting on the information and data before him, drew two separate and conflicting conclusions as to the tax liability, to-wit:

(a) In respect to the corporations and the partnership listed in footnote 2, the Commissioner concluded to disregard for tax purposes the separate existence of each such corporation and such partnership as a separate entity, but to treat for tax purposes the 23 corporations and the partnership as constituting only one entity and that, therefore, Louis Lesser Enterprises was liable as a transferee of the assets received by it on dissolution of the corporation.

(b) In respect to the corporations listed in footnote 2, the Commissioner concluded to treat for tax purposes each such corporation as a separate entity but entitled, however, only to its aliquot share of one single surtax exemption and one single excess profits credit allowable to all of said corporations as a group, and that, therefore, Ardell Homes, Inc. was entitled only to its aliquot share of such exemption and such credit, and that as transferee of assets of said dissolved corporation Louis Lesser Enterprises was liable in the amount of the value of the assets received by it from said corporation.

The three tax deficiency determinations in case No. 10,331 disclose that the income upon which the deficiency determination was made against Revell, Incorporated includes the same income upon which tax deficiency determinations were made against Cutlass Molds, Inc. and Mr. and Mrs. Glaser.[4] Since the Glasers were the sole owners of the stock of Revell No. 1 and were the owners of 75 per cent of the capital stock of Cutlass Molds, Inc., we will assume for the purpose of this opinion that the three tax deficiency determinations in this case were in effect made against Mr. and Mrs. Gliser.

The five notices of tax deficiency determinations in case No. 10,332 disclose that the income upon which the tax deficiency determinations were made against Mr. Mollat as transferee of each of the four corporations is the same income as that upon which the tax deficiency determination was made against Mr. Mollat as transferee of the 23 corporations and the partnership.

The two notices of tax deficiency determinations in case No. 10,333 disclose that the income upon which the tax deficiency determination was made against Louis Lesser Enterprises as transferee of Axtell Homes, Inc. is part of the income upon which the tax deficiency determination was made against Louis Lesser Enterprises as transferee of the 23 corporations and the partnership.

The issue presented for determination in each case is the very narrow one of jurisdiction of the district court

We are not concerned with the merits of any of the tax deficiency determinations made by the Commissioner, nor are we concerned with the jurisdiction of the Tax Court. Simply stated, the problem in each case is whether the district court had jurisdiction to issue the injunction sought in the face of the general prohibition against its use to restrain the assessment or collection of any tax.

The appellant in each case contends that the assessment was invalid because there was no deficiency actually determined as required by Section 6212(a) of the Internal Revenue Code of 1954. This section provides:

"Sec. 6212. Notice of Deficiency

(a) In General.—If the Secretary or his delegates determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail."

Appellants' contention is based on the argument that while there were purported notices of deficiencies in the three cases, no deficiencies had actually been determined because of the conflicting tax deficiency determinations which were made in each case, and that a notice of tax deficiency is authorized by Section 6212(a) only if the tax deficiency has in fact been determined, and that such determination requires a final decision of tax liability by the Commissioner. Appellants then contend that since no tax deficiency was ever actually determined in the three cases that a suit to enjoin the collection of a tax is expressly provided for by Section 6213(a) of the Internal Revenue Code of 1954. This section in full reads as follows:

"Sec. 6213. Restrictions Applicable to Deficiencies; Petition to Tax Court.

(a) Time for Filing Petition and Restriction on Assessment.—Within 90 days, or 150 days if the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

Counsel for the parties agree that the question presented is a novel one in the administration of the Internal Revenue laws. Our research has revealed no decision of a reviewing court based upon this precise point, and none has been called to our attention.

If each notice of tax deficiency determination in each case is separately examined in the light of the statement attached to it, the appellants would be hard put to claim that no tax deficiency had been actually determined by the Commissioner. Nothing appears which would impugn the good faith of the Commissioner in making such determination. On its face, the notice, with attached statement, is not arbitrary, capricious or unreason-

able. On the contrary, the statement attached to each notice discloses that the determination of the Commissioner was based upon extensive investigation and detailed information. In short, it appears on the face of each notice that the determination was thoughtful and considered.

The situation in each of these three cases is unlike the situation considered by this Court in Ventura Consolidated Oil Fields v. Rogan, 86 F. 2d 149 (9th Cir., 1936), certiorari denied 300 U. S. 672 (1937), which case is cited by appellants in support of their position. In that case this Court construed the Commissioner's letter sent to the taxpayer to be in substance only an invitation to the taxpayer to offer to compromise the disputed taxes in an agreed determination to be made the basis of settlement. The letter did not advise the taxpayer that the stated amount would be assessed regardless of the proposal made.

Each of the notices sent in each of the three cases under review was clearly a deficiency notice on its face and each asserted a definite tax deficiency determination on the basis therein stated. The taxpayer in each notice was clearly advised of the right to file a petition with the Tax Court for a redetermination within the period provided by statute.

We prefer, however, not to rest our decision on the ground that each notice of tax deficiency determination is valid on its face, since the law appears to be well settled that we may consider the entire background of each determination in order to determine if it is in fact valid. Scofield Estate v. Commissioner, 206 F. 2d 54 (10th Cir., 1950); Commissioner v. Forest Glen Creamery Co., 98 F. 2d 968 (7th Cir., 1938), certiorari denied 330 U. S.

630 (1930). Thus, we will consider each tax deficiency determination in light of the other notices sent to the same taxpayer.

Appellants argue that the fact that there were conflicting determinations with respect to the same income establishes that the determinations were not reasoned, properly considered decisions by the Commissioner based on the facts before him. Appellants cite many cases in support of the proposition "that, subject only to such review as the law provides, an administrative determination is a final decision, and that it is a final choice of any differing possibilities." Appellants fail to make the distinction between the ex parte tax deficiency determination made by the Commissioner in the administration of the Internal Revenue laws and the type of determination or decision noted in the decisions cited. The administrative determination or decision referred to by appellants is ordinarily based on a hearing of both sides to the controversy. Furthermore, on an appeal from such determination or decision a trial *de novo* is not held in the reviewing court. In such a situation the general rule is that upon review of such determination or decision the reviewing court is usually limited to a consideration of the sufficiency of the evidence to support such determination or decision, or to a question of law. Securities Exchange Commission v. Chenery Corp. *et al.*, 332 U. S. 194 (1947). An entirely different situation exists following an *ex parte* tax deficiency determination by the Commissioner. The taxpayer may petition the Tax Court for a determination of such *ex parte* determination. The proceeding before the Tax Court is adversary, each party to such hearing presenting [illegible] evidence in support of his position. It is true that

one of the facts considered by the Tax Court is the Commissioner's determination, and that a presumption of correctness arises from such determinaiton. Conceivably the Commissioner may lose the benefit of such presumption if it should be made to appear to the Tax Court that the Commissioner has made conflicting determinations against the same person in respect to the same income. In such event the burden of proof would be upon the Commissioner to establish the correctness of his determination. See Cohen v. Commissioner of Internal Revenue, 266 F. 2d 5 (9th Cir., 1959). In the event that the taxpayer elects not to petition the Tax Court for redetermination, he may pay the tax stated in the deficiency determination and institute an action in a United States District court for a refund. In such event the proceedings before the district court are substantially the same as the proceedings before the Tax Court. We, therefore, believe that an *ex parte* tax determination by the Commissioner need not have that degree of finality of decision which would otherwise be required.

Appellants argue that the Tax Court has no jurisdiction to redetermine the determinations made by the Commissioner in these three cases because conflicting determinations against the same taxpayer with respect to the same income establish that no deficiency in tax has actually been determined by the Commissioner. We do not find such argument persuasive. In the first place, appellants have sought to invoke the jurisdiction of the Tax Court in two related determinations made in case No. 16,331, four related determinations made in case No. 16,332, and one related determination in case No. 16,333, by filing petitions in that court for redetermination in respect to such determinations, which petitions are pending and undetermined. In the second place, we are

not confronted by any question of the jurisdiction of the Tax Court. A decision on the jurisdiction of the Tax Court must be deferred until that question is properly before this Court.

Appellants argue that unless appellees are restrained and enjoined from collecting the amount of the tax deficiency determinations in the three cases there is grave danger that the appellees will collect more than one tax from the same person on the same income, which would be patently unfair and unauthorized.

The record is clear that the appellees have not collected the tax deficiency on any one of the tax deficiency determinations. Assessment by the Commissioner has been made only under one tax deficiency determination in each of the three cases. Petitions for redetermination of the remaining tax deficiency determinations are pending and undetermined. We believe that the fears expressed by the appellants that they may be compelled to pay a tax on the same income two or three times do not justify premature condemnation of a course of conduct which has not yet been shown to have been taken.

Appellants complain of the burden placed upon them of contesting the several conflicting tax deficiency determinations. The same burden exists, although perhaps to a lesser degree, on any taxpayer who is dissatisfied with a notice of tax deficiency determination made by the Commissioner. In such case the taxpayer must assume the burden of contesting such determination either before the Tax Court or in a district court. The question of weight to such argument is the duty of the Commissioner to protect the revenue. If the Commissioner in the instant cases had chosen incorrectly to make only one tax deficiency determination in each case under a theory of tax liability reasonably grounded on the

prevented, conceivably the bar of the statute of limitations on assessment would preclude other assessments on other determinations predicated on other theories of tax liability likewise reasonably grounded on the data in his possession. We find no legal or logical reason which compels the Commissioner to run such risk in the proper performance of his duty to protect the revenue.

We find nothing in the record which tends to impeach the good faith of the Commissioner or that the acts of the Commissioner were arbitrary or capricious. The three notices of tax deficiency determinations involved in these three cases, and the related notices of tax deficiency determinations, petitions for the redetermination of which are now in the Tax Court, reveal thoughtful and considered action of the Commissioner based upon investigation and data, the presence of which is essential to the validity of the determinations made in these three cases. The notices, which attached statements containing detailed information, apprised the taxpayers of the determinations made and the basis therefor. They advise the taxpayers of their rights. In our view, the three notices of tax deficiency determinations involved in these three appeals are not *per se* rendered invalid because of the related notices of tax deficiency determinations based on other theories of tax liability.

We hold that since the Commissioner did in fact determine a deficiency in each of the three cases, the trial court properly held that it was without jurisdiction to grant the injunctive relief sought. Accordingly, the orders below dismissing the three actions are, and each of them is, affirmed.

[Entered in Opinion Book] December 21, 1959

PAUL J. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit

Revell, Inc., Appellant, vs. Robert A. Riddell, etc., et al., Appellees. No. 10331.

Judgment

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

Filed and entered: December 21, 1950

United States Court of Appeals for the Ninth Circuit

William Malat, Appellant, vs. Robert A. Riddell, etc., *et al.*, Appellees. No. 16332.

Judgment

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

Filed and entered: December 21, 1959.

United States Court of Appeals for the Ninth Circuit.

Loeffs Lesser Enterprises, *et al.*, Appellants, vs. Robert A. Riddell, etc., *et al.*, Appellees. No. 16533.

Judgment

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

Filed and entered: December 21, 1959.

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Supreme Court, U.S.
FILED
JUL 15 1960
JAMES R. BROWNING, Clerk

No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1960

REVELL, INC., ET AL., PETITIONERS

v.

ROBERT A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE DISTRICT DIRECTOR AND THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MELVA M. GRANEY,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR THE DISTRICT DIRECTOR AND THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit upholding the district court's dismissal of the petitioners' actions for injunctions appears at 273 F. 2d 649 and is reprinted as a Second Appendix to the Petition. The Court of Appeals for the Ninth Circuit issued no opinion in connection with its order denying leave to file petitions for writs of mandamus to the Tax Court.

JURISDICTION

The judgment of the court of appeals affirming the dismissal of the injunction proceedings was entered

on December 21, 1959 (App. R. 74).[1] A timely petition for rehearing was denied on March 23, 1960 (App. R. 83). The order denying leave to file petitions for mandamus was entered on April 1, 1960 (M.R. 10). The petition for writs of certiorari was filed on June 20, 1960.

QUESTIONS PRESENTED

1. Whether 90-day notices of deficiency as a preliminary to assessing and collecting federal taxes are valid when the determinations of deficiency on which they are based are founded on alternative and inconsistent factual and legal bases of liability.

2. Whether the court below properly refused to allow the filing of a petition for mandamus in order to review intermediate procedural steps in a Tax Court proceeding.

STATUTES INVOLVED

The principal statutory provisions involved are Sections 6212, 6213, and 7421 of the Internal Revenue Code of 1954 (26 U.S.C. 6212, 6213, and 7421), all of which are set forth in the opinion of the court below (Second Appendix to Petition, pp. 2, 16, 17) and the corresponding sections of the Internal Revenue Code of 1939, Sections 272 and 3653 (26 U.S.C. (1952 ed.) 272, 3653).

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[1] The petitioners have filed two separate records, one relating to the judgment of the court on the appeal from the district court and the second relating to the proceedings seeking mandamus. The two records will be referred to as "App. R. —" and "M. R. —."

STATEMENT

Since the issues raised by the petition do not involve questions of tax liability, but only questions of procedure, it will not be necessary to repeat the facts relating to liability, which in any event are set forth in some detail in the opinion of the court below. It will suffice to state that three separate cases involving the same issues were consolidated for argument below. In each, a multiplicity of related corporations, 16 in one case, 23 in the second, and 23 in the third, led to complicated issues in assessing income and excess profits taxes. As to each group the Commissioner sent multiple notices of tax deficiencies involving to some extent the same income, each notice being based on a different factual or legal theory and resulting in different tax liability. There were three notices in the first case, five in the second, and two in the third. Although the taxpayers petitioned for review in the Tax Court with respect to most of these deficiencies, they failed to pay the tax or to take any action in the Tax Court with respect to at least one notice in each of the cases, and the Commissioner thereupon proceeded to assess a tax with respect to each of these deficiencies as to which the tax had not been paid and review had not been sought in the Tax Court. Thereupon the taxpayers filed actions in the district court to enjoin the collection of the taxes so assessed and to cancel the purported assessments. The district court dismissed these actions on the ground that such injunctive proceedings were forbidden by Section 7421(a)

of the Internal Revenue Code of 1954, and the court of appeals affirmed the dismissals.

In its opinion the court below indicated that the fact that the Commissioner had chosen to make conflicting determinations against the same persons in respect to the same income might result in depriving such determinations of the presumption of correctness so that in the Tax Court proceedings the burden would be on the Commissioner to prove the correctness of his determination (Second Appendix to Petition, pp. 19–20). On the basis of this dictum, the petitioners moved in the Tax Court proceedings pending on their petitions for review of the alternative deficiency notices to require the Commissioner to state fully the facts relied on by him and his defense. The Tax Court denied this motion, and the petitioners thereupon petitioned the court below for leave to file motions for writs of mandamus. The court below denied this relief without opinion.

The petitioners seek to review both orders of the court below through this petition.

ARGUMENT

1. Actions to restrain the assessment or collection of federal taxes are expressly forbidden (26 U.S.C. 7421). However, an exception to this prohibition is provided where the Commissioner attempts to assess a deficiency or make a collection without sending a deficiency notice to the taxpayer (26 U.S.C. 6212, 6213).[2] The basis for petitioners' argument here is

[2] Insofar as the liability asserted against the petitioners is liability as transferees (App. R. 17, 19, 60–64), Section 7421(b) of the Internal Revenue Code of 1954 precludes injunctive

that the deficiency notices were invalid because the Commissioner had made no determination of the deficiency prior to the service of the notices. It is conceded that formal deficiency notices were properly issued, but it is argued that because of their inconsistency there was in fact no determination by the Commissioner within the meaning of the statute.

Where there are alternative possibilities of tax liability, either because of material issues of law or undetermined issues of fact, the Commissioner has consistently found it necessary, in order to prevent the statute of limitations from running on one alternative while the other was being resolved, to file alternative notices of liability. The logical consequence of the petitioners' argument is that in such circumstances the Commissioner would be required to elect among alternative theories of taxation at his peril. Thus, he would be bound by his initial determination in spite of the fact that that determination would frequently have to be made on the basis of incomplete information as to the crucial facts in the case or without judicial determination on a difficult issue of law.

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relief without any provision for the exception upon which the petitioners otherwise rely.

A classic example of the problems which confront the Commissioner in his attempts to protect the revenue was presented to this Court in *Commissioner* v. *Southwest Expl. Co.*, 350 U.S. 308. In that case, the question was whether the upland owners of land or a drilling company which had contracted to develop oil deposits thereon was entitled to the allowance for depletion. The Commissioner, as this Court noted, had taken inconsistent positions in the lower courts, in each instance opposing the depletion deduction. He was reversed by both the Court of

In issuing protective notices of deficiency it is not the purpose of the Government to collect the same tax more than once. Instead, the procedure is adopted only to make certain that the tax will be collected at least once when the questions as to its amount and the proper taxpayer have been finally determined.

The petitioners do not attack the sufficiency of any one of the deficiency notices standing by itself. The court below found that they were "thoughtful and considered" determinations of deficiency. They contain detailed information informing the taxpayers of the basis for the asserted deficiencies and advise them

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Claims (*United States* v. *Huntington Beach Co.*, 132 C. Cls. 427) and the Ninth Circuit (*Commissioner* v. *Southwest Exploration Co.*, 220 F. 2d 58), each allowing the deduction. Certiorari was granted "because both the drilling company and the upland owners cannot be entitled to depletion on the same income." (350 U.S., p. 369.) Thus, it was not until the matter was before this Court that the Commissioner was able, without prejudicing federal tax collections, to argue that the upland owners were entitled to the deduction. Obviously, if the petitioners' rationale in these cases is correct, the Commissioner would have been obligated to choose between the drilling company and the owners at the deficiency notice stage of the proceedings. If he chose incorrectly, the statute of limitations on assessment would have run by the time a final adjudication had been made by this Court, and both parties would possibly have been allowed the deduction in question—one by virtue of a court decision and the other because of the legal inability of the Commissioner to contest the deduction in the courts. There are no reasons, legal or logical, why such a result should prevail. The petitioners' distinction that not only different theories of taxation, but different taxpayers, were involved does not differentiate this case from the ones before the Court. Actually in one of them different taxpayers are in fact involved, but the Government believes that alternative theories can be pursued even as to the same taxpayer.

of their rights. Had they chosen to do so, the petitioners could have sought review of all of the claimed deficiencies in the Tax Court, thus precluding any attempt at collection prior to a final determination of liability and avoiding the division of the cases between separate courts. If, for their own reasons, the petitioners chose not to take this course, they have no cause for complaint here.

2. The refusal of the court below to permit the use of mandamus to the Tax Court in order to test the denial by it of the motion to require the Government to set forth the facts on which it relied as a defense was entirely correct. Appeal is provided only from a final decision in Tax Court cases; it may not be taken from an interlocutory order. The petitions for mandamus which the petitioners attempted to file were no more than an attempt to accomplish indirectly what they were not permitted to accomplish through direct appeal.

CONCLUSION

The decisions below are correct and involve no conflict. The petition for writs of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MELVA M. GRANEY,
HELEN A. BUCKLEY,
Attorneys.

JULY, 1960.

U. S. GOVERNMENT PRINTING OFFICE: 1960

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SUPREME COURT, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term 1960

No. 159

REVELL, INC., *et al.*,

Petitioners,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS IN REPLY.

GEORGE T. ALTMAN,
233 South Beverly Drive,
Beverly Hills, California,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

IN THE

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Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONERS IN REPLY.

Respondents apparently concede that the court below has decided a federal question in a way in conflict with applicable decisions of this court cited by petitioners. They make no attempt to meet a single contention of petitioners based upon decisions of this court. We refer especially to *Hulburd v. Commissioner*, 296 U. S. 300 (Pet. p. 7), and *Flora v. United States*, 80 S. Ct. 630 (Pet. pp. 7, 10).

We believe that respondents have also shown that the court below has decided an important question of federal law which, in the specific and precise context in-

volved here, should be settled by this court. Respondents state that

> "The Commissioner has consistently found it necessary . . . to file alternative notices of liability." (Br. 5).

They refer, of course, to concurrent notices of the character involved in this proceeding. They point to no decision, nor any statutory provision, upholding the Commissioner's right to do this. If, nevertheless, the Commissioner does this "consistently," then it is in the interest of the federal revenue and of taxpayers throughout the country that the question whether the Commissioner may indeed do this should be settled by this court.

While respondents, as above stated, have completely avoided petitioners' argument, we shall now deal with the points which they do make.

1. Respondents state that it "is conceded that formal deficiency notices were properly issued." (Br. 5). Petitioners do concede that formal deficiency notices were issued. They do not concede that they were "properly" issued.

2. Respondents refer to the notices of deficiency as "alternative notices." (Br. 5). Petitioners submit that there is nothing whatever in the notices to show that they are alternative or intended to be alternative. It would be a gross exaggeration to say that any taxpayer would on reading the notices even suspect that they were alternative.

3. Respondents next speak of the Commissioner's "initial determination." (Br. 5). Which of the several concurrent conflicting "determinations" is the "initial"

one they of course cannot say. Obviously the term "determination" is not appropriate at all. The term "pleading" would be; but the statute requires a determination.

4. The court below predicated its conclusion that there was a determination on its observation that:

> "the statement attached to each notice discloses that the determination of the Commissioner was based upon extensive investigation and detailed information. In short, it appears on the face of each notice that the determination was thoughtful and considered." (Second Appendix to Pet. p. 18).

Respondents now contend, however, that the situation presented results from "alternative possibilities of tax liability, either because of *material issues of law* or *undetermined issues of fact*," and that unless conflicting "determinations" were permitted "determination would frequently have to be made on the basis of *incomplete information* as to the *crucial facts* in the case or without *judicial* determination on a difficult issue of law." (Br. 5; Italics added). What we have actually then is a confession by respondents that, contrary to what the court below thought, these so-called determinations were not based on "extensive investigation and detailed information," that they were not "thoughtful and considered."

Nor do respondents explain why the Commissioner cannot resolve "material issues of law," why a determination cannot be made by him without "judicial" determination on a difficult issue of law. Moreover, if it is a judicial determination that the Commissioner wants, there is absolutely no statutory authority given him to use the procedure of notice of deficiency in order to force the taxpayer to initiate the proceeding for such

a determination. If there is such authority, let respondents point to it.

5. Respondents next refer to the notices of deficiency as "protective" notices of deficiency, and say that "it is not the purpose of the Government to collect the same tax more than once." (Br. 6). But the deficiency notices themselves, as observed above in paragraph 2, completely fail to disclose this.

The same is true of the related notices of demand for tax [Tr., Revell, Inc., pp. 21-22; Tr. Wm. Malat, pp. 14-16; Tr. Louis Lesser Enterprises, p. 9]. What the taxpayers have sought in these proceedings is injunction against actual collection by the District Director of the amounts shown by those notices of deficiency which were not followed by petition in the Tax Court. As to each of those amounts the District Director made, as the cited pages in the transcript of record show, an actual demand for payment by the taxpayer.

None of those demands for tax say that they are protective or that "it is not the purpose of the Government to collect the same tax more than once." Each demand is a simple demand for payment. Thus in Louis Lesser Enterprises, as shown at page 9 of the transcript in that proceeding, the demand for payment describes the assessment and then simply says

> "Please return this notice with payment to District Director of Internal Revenue."

In the Revell, Inc., proceeding the demand is somewhat more insistent. As shown at page 22 of the transcript in that case the demand states

> "If payment of 'Balance due,' which includes interest, is not received within 10 days from the date

of this notice, your account will be assigned to an Internal Revenue Collection Officer without further notice. Under the law, he may levy on your wages, salary, or other income, or seize or sell your property or rights to property to collect this account."

In the William Malat case there was a second demand. As shown at page 10 of the transcript in that case, the second demand contains the following:

"According to our records, the above account for which a statement of tax due was sent to you is still unpaid. It has now been assigned to me for collection.

"Unless you have already paid this account, or make immediate payment directly to this office, we will take action to enforce collection. Such action may result in levy on your property, receivables, bank accounts, salary, wages, commissions or other income as a means of collecting your unpaid account."

There is here no polite invitation to pay. There is no statement that if the amounts demanded are paid the amounts covered by the other concurrent notices of deficiency, on which petitions were filed in the Tax Court, would be abated. There is nothing whatever to apprise the taxpayer that the same tax would not be collected more than once.

Indeed, there is nothing on the face of the notices to show they are conflicting. The taxpayer may honestly be led to believe that he owes all of the amounts. In believing so he files no petition in the Tax Court, which of the amounts, since they are different, will the govern-

ment assess? And if the government assesses all, and the taxpayer pays them, which ones, if any, will be refunded?

6. Next respondents state that the "procedure is adopted only to make certain that the tax will be collected at least once when the questions *as to its amount* and the proper taxpayer have been finally determined." (Br. 6; Italics added). Who is to make that final determination? Is it the Commissioner? Is it a court? Indeed, is the taxpayer to be forced into court in order to have his tax determined?

The very contrary is the law. Under the clear terms of the statute, it is the duty of the Commissioner (or "the Secretary or his delegate" under the 1954 Internal Revenue Code) to make the determination. The only power of the Tax Court is to make a *redetermination*. (Pet. Appendix, pp. 3, 7).

7. Finally, respondents assume that by means of the conflicting "determinations" involved, here litigation involving a single tax can be divided between separate courts. (Br. 7.) But that is the very thing which the *Flora* case, *supra*, says cannot be done.

Conclusion.

Petitioners submit in conclusion that respondents' brief in opposition not only fails to meet but on the contrary emphasizes the points raised in petitioners' brief, and further that the question presented is an important question of federal law which has not been but should be settled by this Court.

Respectfully submitted,

GEORGE T. ALTMAN,

Attorney for Petitioners.

IN THE

Supreme Court of the United States

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion of Albert H. Allen et al. for Leave to File Brief Attached of Albert H. Allen as Amicus Curiae in Support of Petition for Writs of Certiorari and Brief of Albert H. Allen as Amicus Curiae.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960

No. 159

REVELL, INC., *et al.*,

Petitioners,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Motion of Albert H. Allen et al. for Leave to File Brief Attached of Albert H. Allen as Amicus Curiae in Support of Petition for Writs of Certiorari.

Your *amicus*, Albert H. Allen, an attorney admitted to practice in this Court, moves the court for leave to file the attached brief as *amicus curiae* in support of the petition herein for writs of certiorari to the United States Court of Appeals for the Ninth Circuit. The interest of your *amicus* in this proceeding is shown in the attached brief.

Your *amicus* sets forth that he has received the consent of George T. Altman, counsel for petitioners herein, to the filing of the attached brief; but that

Honorable J. Lee Rankin, Solicitor General of the United States, has refused such consent.

Your *amicus* further sets forth that the attorneys whose names appear below have authorized him to say that they support and join in this motion, and that they now have pending in the Tax Court of the United States matters containing the same situation of conflicting "determinations" as is involved in this proceeding, and your *amicus* and the said attorneys submit to this court that the issue presented is one of the utmost importance in federal revenue procedure and should be settled by this court.

Wherefore your *amicus* prays that this motion be granted.

ALBERT H. ALLEN,
Pro Se et al.

Attorneys Supporting and Joining in Above Motion.

Kurt R. Anker, Esq., 9008 Wilshire Boulevard, Beverly Hills, California

Chris G. Demetriou, Esq., 1015 Wilshire Boulevard, Los Angeles 17, California

Marvin Finell, Esq., 118 South Beverly Drive, Beverly Hills, California

Marvin Goodson, Esq., 6399 Wilshire Boulevard, Los Angeles 48, California

Ralph B. Herzog, Esq., 9808 Wilshire Boulevard, Beverly Hills, California

Nathan R. Herzberg, Esq., 6303 Wilshire Boulevard, Los Angeles 48, California

Richard H. McCracken, Esq., 900 Wilshire Boulevard, Los Angeles 17, California

Martin S. Stolzoff, Esq., 404 North Roxbury Drive, Beverly Hills, California

Joseph J. Strassburg, Esq., 214 North Canon Drive, Beverly Hills, California

Maynard J. Toll of O'Melveny & Myers, 433 South Spring Street, Los Angeles 13, California

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 159

REVELL, INC., *et al.*,

Petitioners,

vs.

ROBERT A. RIDDELL, District Director of Internal Revenue, *et al.*,

Respondents.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Albert H. Allen as Amicus Curiae.

Comes now Albert H. Allen and submits this brief as *amicus curiae* in support of the petition herein for writs of certiorari.

Your *amicus* is an attorney-at-law admitted to practice in this court. As an attorney admitted to practice in the Tax Court of the United States he has filed and there are now pending in the Tax Court of the United States, a large number of petitions on behalf of taxpayers in matters in which the Commissioner has issued statutory deficiency notices, the determinations in which are of the same general character as those involved in this proceeding.

With respect to the volume of these petitions which your *amicus* has filed in the Tax Court of the United States, your *amicus* sets forth that he alone has filed and there are presently pending one hundred eighty-five petitions involving eighty five separate taxpayers on statutory notices for income tax deficiencies arising from conflicting determinations similar to those involved in this proceeding before this court. In most instances the tax demanded by reason of such conflicting notices is two and three times the amount of tax which the Commissioner could recover on any one theory asserted by him and in the interim the taxpayer faces a proposed assessment under all of the notices which the Commissioner contends the taxpayer must prove are incorrect.

Your *amicus* submits that in addition on June 14, 1960, there were served upon no less than *fifty individual clients* of your *amicus*, ninety-day statutory notices arising out of a set of facts almost identical to the facts and issues in the matters hereinentitled *Malat vs. Riddell* and *Lyons Lessor Enterprises vs. Riddell*.

In each of these notices served on June 14, 1960, the Commissioner purportedly reached a determination that the respective taxpayers were liable as transferees of the separate corporations involved under the provisions of Sections 482, 269 and 1551 of the Internal Revenue Code of 1954. However, on June 17, 1960, the Commissioner served upon the identical taxpayers, ninety-day statutory notices in which the Commissioner again made an alleged determination of income taxes due from the same taxpayers arising out of the identical corporations. In each instance the Commissioner purportedly determined a tax is due by each of the in-

dividuals as transferees of an association of the same corporations, which the Commissioner has allegedly determined is an association taxable as a corporation under Section 7701 (a)(3) of the Internal Revenue Code of 1954.

Each of the fifty individual clients will now have to file separate petitions with respect to the notice served on June 14, 1960 and the notice served on June 17, 1960, or in lieu thereof pay two one-hundred times the amount of tax collectible on an assessment under either of said notices. The burden of filing petitions in answer to the two so-called determinations of the Commissioner is an unwarranted burden which, your *amicus* contends, was beyond the intention of Congress and has placed the taxpayers in a position of either the burden and costs of preparing and filing the petitions or paying large taxes beyond the amount claimed on any one theory of the facts.

Your *amicus* submits to this court that it is of the utmost importance for taxpayers generally to know whether the Commissioner of Internal Revenue may assert against the same persons and based upon the same income several concurrent deficiency determinations in different amounts and grounded upon different and conflicting theories of facts and force seeking a tax four and five times the total amount of the tax for which the taxpayer could lawfully be held liable on any theory of the facts and whether or not the Commissioner may indeed do so, the person against whom such deficiencies are asserted is required to disprove any or all of such factual theories, although some of the conflicts with the others only one can possibly be true.

Your *amicus* submits that it is of the utmost importance for taxpayers generally to know whether the related notices of deficiencies, each on its face wholly independent of the others, and demanding payment of the amount shown therein, so that as far as the recipient is advised the Government is demanding payment of all of the amounts asserted, whether that is consistent with due process under the Constitution; whether a taxpayer against whom the Commissioner contends a tax is due is to be subjected to a number of statutory notices arising out of the same transaction, each demanding a tax which collectively may be four or five or ten times the amount of the total tax which could have been due by the taxpayer under any circumstances.

Your *amicus* respectfully submits that the questions raised by the petition herein for writs of certiorari are of the utmost importance to taxpayers; he respectfully urges the granting of said writs to the United States Court of Appeals for the Ninth Circuit as prayed for in the petition now before the court.

Respectfully submitted,

ALBERT H. ALLEN,

Amicus Curiae.